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No. 86-

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1986

IN RE: JOSEPH S. WOOL

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. In this lawyer disciplinary proceeding originating in the United States District Court for the District of Vermont, did Petitioner Joseph S. Wool receive constitutionally fair notice in the charging papers, apprising him that he was called upon to defend allegations of charging or collecting an excessive fee so as to satisfy the requirement of In re Ruffalo 390 U.S. 544, 20 L.ed 2d 117, 88 S.Ct. 1222 (1968)?

2. Did the Court of Appeals for the Second Circuit commit reversible error in holding that pre-hearing notice to Petitioner Joseph S. Wool in the U. S. District Court was constitutionally adequate?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.	i
TABLE OF AUTHORITIES	iii
PETITION	1
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE.	2
REASONS WHY REVIEW SHOULD BE GRANTED.	11
CONCLUSION	15

TABLE OF AUTHORITIES

	Pages Cited
Cases	
Gibson v. Lockeed Aircraft Service, Inc., 350 U.S. 356, 100 L.ed 395, 76 S.Ct.366 (1955)	12
In Re Ruffalo, 390 U.S. 544, 550, 20 L.ed 2d 117, 88 S.Ct. 1222 (1968)	i, 11, 13,14
Statutes	
Disciplinary Rule 2-106(A)	4,8,13
Disciplinary Rule 2-106(B)	4,6,8
Disciplinary Rule 9-101(C)	4,5,8
Local Rule 16	3
8 USC 1324(a)(1)	3
28 USC 1254(1)	2

IN THE
SUPREME COURT OF THE UNITED STATES
TERM, 1986

IN RE: JOSEPH S. WOOL
Petitioner[1].

PETITION

Joseph S. Wool petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the judgment by which that court affirmed a judgment of the U.S. District Court for the District of Vermont suspending Petitioner from the practice of law in that court.

OPINIONS BELOW

Neither the opinion of the Second Circuit Court of Appeals nor the opinion of the United States District Court for the

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1. At all stages of this proceeding The Hon. David A. Gibson, P. O. Box 1767, Brattleboro, Vermont, has acted as Bar Counsel; there are no other parties.

District of Vermont is reported. The former appears in the Appendix to this petition at A-1, the latter at A-6.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on January 21, 1986. This Court's jurisdiction is invoked pursuant to 28 USC 1254(1).

STATUTORY PROVISIONS

This case involves provisions of the Fifth Amendment to the United States Constitution which appear at A-63, Local Rule 16 of the United States District Court for the District of Vermont pertinent provisions of which appear at A-63 and statutes of the State of Vermont pertinent provisions of which appear at A-67-69.

STATEMENT OF THE CASE

Petitioner Joseph S. Wool is a lawyer admitted to practice before the United States District Court for the

District of Vermont (hereinafter District Court) on July 21, 1939. This is a lawyer disciplinary matter before the District Court pursuant to its Local Rule 16, pertinent portions of which appear at A-63.

This matter arose from Mr. Wool's representation beginning in October, 1982, of Rene Cormier, who was then charged with felony counts of smuggling aliens in violation of 8 USC 1324(a)(1). Mr. Wool and the client agreed in advance that the fee would be $6,000.00 U.S. (Memorandum of Decision A-9). After sentence on January 24, 1983, the client wrote a letter to the presiding judge, The Hon. Albert Coffrin, complaining about the services rendered by Mr. Wool (A-24).

Pursuant to Local Rule 16, David Gibson, Esq. was appointed Bar Counsel to investigate the complaint; on July 17,

1984, his report was filed with the District Court (A-42); in pertinent part that report states "... the evidence supports a prima facie conclusion that Mr. Wool violated the Code of Professional Responsibility... as promulgated by the Vermont Supreme Court. Disciplinary Rule 9-101(C) provides as follows: '(C) A lawyer shall not state or imply that he is able to influence improperly or upon irrelevant grounds any tribunal, legislative body, or public official.'"

Nowhere in this report is there any suggestion, allegation or conclusion that the $6,000 fee was excessive or violative of DR 2-106(A); nowhere in this report is there any discussion of any of the factors set forth in DR 2-106(B) (A-42).

On December 17, 1984, Mr. Gibson filed a petition for an order to show

cause with his investigative report appended (A-33) and on December 26, 1984, the District Court issued its order to show cause to Mr. Wool requiring him to respond to "why appropriate disciplinary action should not be taken [against you] for conduct described in said Petition for Order to Show Cause and in the report of investigation of David A. Gibson, Esq. ...." At all times prior to the motion for new trial, Mr. Wool represented himself and appeared at trial pro se.

The Petition sets out nineteen numbered paragraphs, the nineteenth of which specifically sets out the text of DR 9-101(C) quoted above. The eighteen paragraphs above that set out factual allegations that Mr. Wool violated DR 9-101(C). Nowhere is there an allegation that the $6,000 fee was excessive, or clearly excessive; nowhere in the Petition are

there allegations focusing on the factors set out in DR 2-106(B), i.e. the difficulty of the Cormier case, the time spent, the skills involved or Mr. Wool's standing and reputation in the Bar (A-33).

The matter went to contested hearing. Bar Counsel neither presented evidence on the factors set out in DR 2-106(B) nor in any other way tried to prove that the fee was clearly excessive; Mr. Wool testified in his own defense and provided the only trial evidence on the propriety of the fee, in response to questions from the bench. The Wool testimony on this issue appears in the transcript at p.II 102, lines 13-25 as follows:

> JUDGE BILLINGS: What was the basis for assessing the fee?
>
> MR. WOOL: What was that?
>
> JUDGE BILLINGS: The basis for assessing the fee?
>
> MR. WOOL: I felt that this is

what this type of a matter was worth. And I indicated to Miss Morin, who was -- who had met me when we talked about the fee, that that's what it was. And if she did not wish to pay it, they could hire other counsel.

I met with Miss Morin and with Rene's brother at the office of Frank Shoofey. And the matter of the fee was discussed. And I advised them exactly as to what the fee would be."

On August 30, 1985, the District Court issued its "Memorandum of Decision" (A-6). The District Court focused on the $6,000 fee: under the heading "Findings of Facts" the Court reviewed the evidence and then stated "[I]n summary, the evidence at hand establishes without question that the fee charged and collected by respondent was unreasonable and unjustified on the record before us." (A-16) Beginning its "Conclusions" the Court states [A]t the threshold the court concludes that the charge imposed by the respondent for representing Rene Cormier in the federal prosecution in this court

was excessive. More importantly, the charge of $6,000 obviously drained the accused's resources and overburdened some who contributed to its payment. A lawyer is forbidden to charge or collect a fee that is clearly excessive DR 2-106(A)." (A-18) The court then went on to discuss the factors set out in DR 2-106(B).

On the specific allegations of the petition, the alleged factual basis for violating DR 9-101(C), the court said "the evidence fails to establish that respondent explicitly misrepresented that he could or would influence the court or prosecuting officers, oblique suggestion led Cormier and his family to believe a favorable result would be assured by the payment of money." (A-20-21). Again "the evidence presented falls short of establishing that respondent directly stated or clearly implied that the money advanced would be

used to improperly influence the outcome, there was sufficient hint and suggestion to allow a hopeful listener to think such conduct was likely." (A-23)

On motion for new trial which pointed out the failure of procedural due process (A-28), the Court per Holden, J., on oral argument, crystalized the situation as follows:

> But the means for collecting the $6,000, if there'd been no $6,000 fee, I don't think the Court would have been concerned at all. Or if the $6,000 fee was fully justified under all the facts, but the sanction here, you should understand, is not based on a -- respondent's collection of an improper fee.
>
> MR. BLUM: I do understand that, your Honor.
>
> JUDGE HOLDEN: It was the means of his collecting it that troubled the Court, the thrust of the complaint, as written by bar counsel.
>
> Transcript, Motion for New Trial, p.19, lines 4-13.

Despite Judge Holden's reference to

Bar Counsel's complaint, a colloquoy between Judge Billings and Defense Counsel makes clear that the Court was considering Mr. Wool's hearing testimony on the secret issue of the excessiveness of the fee:

> JUDGE BILLINGS: Mr. Blum, do I understand that the testimony or offer of proof would be different than the transcript at the original hearing? Because as I remember it, and I look at my notes, and Mr. Wool stated at that time that he had no payment records whatsoever in this case.
>
> MR. BLUM: No payment records, your Honor?
>
> JUDGE BILLINGS: That's right. Or time records.
>
> MR. BLUM: We have a reconstructed -- we have reconstructed the -- from the file, your Honor.
>
> JUDGE BILLINGS: Well, then, his testimony would be different now than it was at that time?
>
> MR. BLUM: Well, time records means to me, your Honor, the Safeguard type system of time records.
>
> What I'm saying is that we took the file and reconstructed it, letters, trips, that sort of thing, and estimated what amount of time was expended.

JUDGE BILLINGS: But the offer of proof is no different, that he had no records as of that time?

MR. BLUM: No, not at that time, your Honor.

Transcript, Motion for New Trial, p.19, lines 5-23.

New trial was denied. On appeal the Second Circuit Court of Appeals affirmed, holding that pre-hearing notice to Mr. Wool had been adequate, especially since Bar Counsel's report of investigation was attached to the complaint (A-1-4).

REASONS WHY REVIEW SHOULD BE GRANTED

The Court should issue its writ of certiorari to the Court of Appeals for the Second Circuit for two reasons:

1. To review the issue of denial of Petitioner Wool's constitutional right to procedural due process, see In re Ruffalo 390 U.S. 544,550, 20 L.ed 2d 117, 88 S.Ct. 1222 (1968).

2. To review and correct the procedure

employed by the United States District Court for the District of Vermont, and sanctioned by the Court of Appeals, which departed from the accepted and usual course of judicial proceeding, all in the exercise of the power of supervision vested in the Supreme Court, see Gibson v. Lockeed Aircraft Service, Inc. 350 U.S. 356, 100 L.ed 395, 76 S.Ct.366 (1955).

In this federal disciplinary matter, Petitioner Wool was essentially subjected to trial by ambush. He was served with a petition and order to show cause which did not provide him with any fair notice that the issue of an excessive fee was alleged, or that the amount of the fee itself was so large as to suggest improper or corrupt influence (A-33).

The Memorandum of Decision (A-6) by the District Court makes clear that the allegations of the petition were not proved.

However, the Court crafted an alternate method of sustaining the petition: it decided that an issue not raised in the petition, an issue of which Petitioner had no pre-hearing notice, the excessiveness of the legal fee involved, supplied the evidentiary basis to sustain the petition. While it is technically true that the District Court did not directly discipline Petitioner for violation of DR 2-106(A), a violation of that section was clearly the crux of the case.

Should this District Court decision stand, as sanctioned by the Court of Appeals, it would not only permit circumvention of the plain requirements of In re Ruffalo supra, thereby depriving Petitioner of his constitutional right to pre-hearing procedural due process, but also would permit the courts below to depart from the accepted and usual course

of judicial proceedings.

Here, as in Ruffalo, it appears that Petitioner's own testimony in the District Court, on an issue not noticed, formed the minds of the triers of fact in the matter. Should this decision stand, the crudity of an attempt to amend, as was struck down in Ruffalo, becomes unnecessary. Unnoticed violations of the Code will simply be grafted to the allegations of the petition to make a husk of the protections of procedural due process.

The departure from the accepted and usual course is especially poignant here, where the District Court in its Memorandum of Decision taxed the Petitioner with the failure to provide evidence or proof on the issue of which he had no fair pre-hearing notice. Hear the District Court under the heading "Findings of

Fact": "The $6,000 collected by the respondent as retained counsel was not explained nor accounted for. Absent any explication by the respondent, the court has been called upon to consult the court records in the criminal prosecution in which respondent served as defense counsel." (Memorandum of Decision A-17). And again: "in summary, the evidence at hand establishes without question that the fee charged and collected by the respondent was unreasonable and unjustified on the record before us." (Memorandum of Decision A-16)[emphasis ours].

CONCLUSION

Lawyer disciplinary proceedings originating in Federal Courts are infrequent but an important part of the court function. The proceedings must be fair, not only because procedural due process is constitutionally mandated, but also be-

cause the integrity of the court system depends upon it. There is an apparent failure of fundamental fairness here, therefore the court is urged to issue the writ of certiorari to review.

Respectfully submitted,

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